ARBITRATION ISSUE 23: Assurance of Payment - Should the Interconnection Agreement Include Language Requiring Adequate Assurance of Payment From CLECs for Amounts Due or to Become Due? (Verizon's proposed Part A, § 20)

Cavalier's Position: Cavalier has never responded to Verizon's proposal regarding assurance of payment, so Verizon does not know if Cavalier disputes its assurance of payment proposal, and if so, on what basis.

Verizon's Actual Position and Proposed Resolution

The agreement should include language demanding adequate assurance of payment in the event that a CLEC becomes financially unstable or unable to make payment. This language is akin to security payments which Verizon may require of its own end users under its retail tariffs, or the insurance Verizon requires from its vendors.

Under Verizon's assurance of payment proposal, Verizon may request assurance of payment from Cavalier if there has been a material change in Cavalier's creditworthiness, if Cavalier cannot demonstrate its creditworthiness, if Cavalier fails to pay a bill on a timely basis, or if Cavalier admits that it is unable to pay bills or commences a bankruptcy proceeding. Verizon's proposal is necessary to address its legitimate need for financial protection from non-creditworthy entities to which Verizon is required to provide service. The current volatile telecommunications environment makes Verizon's need more acute.

Verizon's recent arbitration with WorldCom provides a timely example. When Verizon provided its assurance of payment proposal to WorldCom in an arbitration before the FCC's Wireline Competition Bureau (the "Bureau"),[145] WorldCom claimed that Verizon's proposal was only necessary for "other, less financially-stable" CLECs.[146] WorldCom's recent

[145] *Virginia Arbitration Order.*

[146] *Id.* at ¶ 726.

bankruptcy makes abundantly clear that it cannot rely on apparent financial stability, past performance, or a carrier's claims of stability. The Bureau agreed with Verizon, stating that "Verizon has a legitimate business interest in receiving assurances of payment. . . from its [CLEC] customers."[147]

Verizon's proposal to ensure it has the right to seek assurance of payment from Cavalier is akin to Verizon's rights with respect to its retail customers pursuant to the terms of its retail tariffs. Specifically, Verizon may require an end user who is not creditworthy to provide assurance of payment in the form of a security deposit. Additionally, if the end user does not make timely payments, Verizon may suspend or terminate service. The Commission, like the Bureau, should provide Verizon equivalent protection from Cavalier when Verizon provides service to Cavalier.

[147] *Virginia Arbitration Opinion* at ¶ 121.

ARBITRATION ISSUE **24:** Standards of Performance **-** Should the Interconnection Agreement Reference Currently Applicable Standards of Performance? (Verizon's proposed Part A, **§ 34)**

Cavalier's Position: Although Cavalier has never responded to Verizon's proposal regarding standards of performance, Cavalier appears content to rely on a reference to standards of performance and associated requirements superseded by the ***Virginia Collaborative.***[148]

Verizon's Actual Position and Proposed Resolution

The interconnection agreement should reference currently applicable standards of performance. In Virginia, those standards of performance result from the ***Virginia Collaborative.*** The performance standards set forth in the parties' existing agreement have been twice superseded, first by the ***BA/GTE Merger Order***[149] and then by the Commission's order in the ***Virginia Collaborative.*** Accordingly, Verizon proposes to update the standards of performance section of the parties' agreement to reflect currently applicable law. Moreover, Verizon proposes to strike the specific requirements in the parties' existing agreement that differ from the requirements in effect as a result **of** the ***Virginia Collaborative.***

Verizon's proposal ensures that the agreement remains up-to-date and consistent for all CLECs. Cavalier is not entitled to carve out a differing performance plan or "grandfather" an outdated plan applicable only as between itself and Verizon. The role of performance measurements or a performance incentive plan in providing appropriate incentives to ensure an open and competitive market is an inquiry much broader—and involving many more parties—than the inquiry into the rights and obligations of particular parties to an interconnection agreement. To ensure consistent and non-discriminatory treatment of all CLECs, Verizon should

[148] ***See In Re Establishment** of **a Collaborative Committee** to **Investigate Market Opening Measures,*** Case No. PUC000026 (the ***"Virginia Collaborative").***

[149] ***Merger Order*** at ¶¶ *278-3* 18 and Attachment A.

not be subjected to different performance plans in differing interconnection agreement. Verizon's proposal ensures consistent standards for all CLECs and ensures that Verizon is not burdened with differing plans for differing CLECs.

<u>ARBITRATION ISSUE 25: Rights of Way</u> - Should The Interconnection Agreement Contain Detailed Terms and Conditions Governing Cavalier's Access To Verizon's Poles, Ducts, Conduits and Rights of Way? (Verizon's proposed Attachment VI)

<u>Cavalier's Position</u>: All terms and conditions governing Cavalier's access to Verizon's poles, ducts, conduits and rights of way should **be** contained in the interconnection agreement.

<u>Verizon's Actual Position and Proposed Resolution</u>

The Parties generally agree on the terms and conditions governing Cavalier's access to Verizon's poles, ducts, conduits and rights of way. The controversy lies in where those terms and conditions should exist -- in a separate license agreement or in the Parties' interconnection agreement. Consistent with Verizon's nondiscrimination obligations under the Act and its practice with other CLECs, telecommunications providers and CATV providers in Virginia, such terms and conditions should continue to be placed in a separate license agreement.

Section 251(b)(4) imposes upon each LEC the "duty to afford access to ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[150] Section 224(f)(1) imposes upon ILECs the duty to "provide ... any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."'" Nothing in the Act, however, requires that those rates, terms and conditions be included in the Parties' interconnection agreement; rather, for the reasons described below, such rates, terms and conditions should be included in a separate licensing agreement that is, at most, referenced in the Parties' interconnection agreement.

[150] 47 U.S.C. § 251(b)(4).

[151] 47 U.S.C. §224(f)(1).

First, it is, and has been, common practice to include detailed interconnection terms and conditions in places other than the interconnection agreement. Interconnection terms and conditions obligating both ILECs and CLECs often have been the subject of collaboratives and industry forums, and often are contained in settlement agreements and separate license agreements. Numerous commissions have approved this practice by approving interconnection agreements that reference such other agreements as satisfactory under the Act. In that vein, Verizon satisfies its obligations under the Act by including in the interconnection agreement a reference to the separate license agreement in which the specific terms and conditions governing non-discriminatory access to Verizon's poles, ducts, conduits and rights of way are set forth in detail.

Indeed, Verizon and Cavalier have followed this practice since October 31, 1998. The parties current agreement does not terminate until notice is given in accordance with the provisions of that agreement – and Cavalier has not given notice that it intends to terminate the licensing agreement. If Cavalier wishes to negotiate a different licensing agreement, Verizon is more than willing to do so. Cavalier's attempt to "negotiate" through this arbitration should be rejected.

It is also more sensible to place these terms and conditions in separate licensing agreements. Generally, interconnection agreements address the sale of Verizon's network services and products, not the methods, procedures, timeframes and safety requirements that comprise a licensing agreement. Particularly because provisions for access to poles, ducts, conduits and rights of way generally have state-specific operating procedures, a separate license agreement referenced in the interconnection agreement is especially appropriate for terms and conditions governing such access. For example, under Verizon New England's standard agreement, there is a limit of 200 poles per application, unit pricing is used to determine make-ready costs, reasonable efforts are made to complete make ready work in six months, and tri-party license agreements are formed with power companies. By contrast, under the agreement used in Virginia (as well as elsewhere in the Mid-Atlantic territory encompassing Washington D.C., New Jersey, Pennsylvania, Delaware, Maryland, Virginia and West Virginia), there is no pole limit per application, actual costs are used for billing **for** make-ready work, Verizon completes make ready work at parity with or better than it completes its own make ready work, and license agreements are formed only between Verizon and the attaching party. In addition, pole and conduit agreements are entered into separately in New England and New York. In Virginia, these are contained in one single agreement. In short, Verizon's standard agreements vary in their treatment of operating procedures, attachment fees, and pole limitations within a single Planning Manager Area. There are also several differences between the Virginia agreement and agreements used in New York and in the former GTE areas. Given these differences, such terms and conditions should not he included in interconnection agreements that are subject to being adopted in **other** states.

Furthermore, interconnection agreements are executed exclusively with CLEC entities and not CATV entities, which are entitled to the same rights of access as CLECs. Verizon must permit nondiscriminatory access to CLECs and CATV entities alike. Consequently, Verizon has established licensing agreements independent of interconnection agreements that are handled from start to finish by a separate group that must make absolutely certain that all poles attachees, including CLEC and CATV entities are treated in a non-discriminatory manner. Combining these processes will only result in inefficiencies and discriminatory treatment of attachees and occupants of Verizon's poles, ducts, conduits and rights of way.

Finally, the Commission must consider the respective burdens of the Parties. Verizon currently has approximately 130 agreements with CATV companies and at least 70 agreements with CLECs, independent telecommunications companies and other parties. Verizon has established processes in place to handle all requests for access to poles, ducts, conduit and rights of way from all of these companies. These processes have been administered by Verizon's Pole Conduit Licensing Center in Richmond, Virginia since 1998. Verizon VA ensures that it provides non-discriminatory access because its relationships with all parties within the state are governed by the same rates, terms, and conditions. If those terms and conditions were different, however, and included in each CLEC's separate interconnection agreement, it would be much more difficult to ensure that all were being treated fairly. Utilizing a separate agreement thus alleviates Verizon's administrative burden by not requiring it to keep track of different agreements and by not interfering with the current practice in Virginia. By contrast, Cavalier cannot claim to be burdened if the terms and conditions for access to rights of way are set forth in a separate agreement instead of the Interconnection Agreement.

Verizon's proposed language adequately addresses access to poles, ducts, conduits, and rights-of-way by appropriately referencing tariffs or existing licensing agreements between the Parties.

VI. CONCLUSION

For the foregoing reasons, the Commission should order the Parties to adopt Verizon's proposed language on the outstanding arbitration issues and should reject Cavalier's proposed alternate language.

DATED: September 9, 2002

Respectfully submitted,

Kelly L. Faglioni

By Counsel

DAVID K. HALL
Attorney for Verizon
1515 North Court House Road
Fifth Floor
Arlington, Virginia 22201
Tel: 703-351-3100

LYDIA R. PULLEY
600 E. Main St., 11'' Floor
Richmond, VA 23233
Tel: 804-772-1547

KELLY L. FAGLIONI
MEREDITH B. MILES
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Tel: 804-788-8200
Fax: 804-788-8218

Attorneys for Verizon Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of September 2002 served a true and correct copy of the foregoing Response of Verizon Virginia Inc. to Cavalier Telephone, LLC's Petition For Arbitration as follows:

BY HAND
Donald F. Lynch, III
Assistant General Counsel
Cavalier Telephone, LLC
2134 W. Laburnum Avenue
Richmond, VA 23227

Kelly L. Faglioni

Kelly L. Faglioni

<u>Exhibit D</u>

Cavalier Response To Six New Issues Raised In Verizon Response (filed October 4,2002).

BEFORE THE
VIRGINIA STATE CORPORATION COMMISSION

Petition of	)	
Cavalier Telephone, LLC.		Case No. PUC-2002-00171
For Arbitration with Verizon Virginia, Inc. pursuant to 47 U.S.C. § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	))))	

RESPONSE OF CAVALIER TELEPHONE, LLC TO NEW ISSUES RAISED BY VERIZON VIRGINIA INC.

Cavalier Telephone, LLC ("Cavalier"), through its undersigned counsel, responds to the new issues raised by Verizon Virginia Inc. ("Verizon") in its September 9,2002 "Response of Verizon Virginia Inc." in this proceeding ("Response")

I. INTRODUCTION

Cavalier disagrees with Verizon's mischaracterization of Cavalier's allegations and the negotiation process. "Negotiating" with Verizon is at best a Sisyphean process.

II. SUPPORTING EXHIBITS

Verizon's Exhibit "A" is obviously a new development to Cavalier, because Verizon adamantly insisted upon using its own model agreement as a basis for negotiations until August 13,2002 — near the very end of the 160-day negotiation period under 47 U.S.C. § **252.** Cavalier cautiously welcomes Verizon's change of position, but Cavalier notes that Verizon only produced Exhibit "A" after the close of the 160-day negotiation period, and not in redlined form.

111. NEGOTIATIONS

As indicated by its almost exclusive reliance on one August 13,2002 e-mail (Response at p. 2, p. 2 nn. 1 and 2, p. 3, p. ***3*** nn. ***3*** and 4, p. 4, and p. ***5*** n. 8), Verizon began negotiating in earnest very late in the negotiation process. Nonetheless, as Cavalier clarified in response to that e-mail,[3] Cavalier consistently sought to use its prior interconnection agreement as the basis for negotiations concerning Virginia. In fact, in that response to Verizon, Cavalier sought to avoid precisely the result achieved by Verizon in its Response: the sudden appearance of issues that "are buried in [Verizon's] new template." (Id.)

In the same communication, Cavalier also clarified that it had suggested using provisions from the new "MCI/Cox/AT&T agreement" (id.), but that Cavalier's individual issues remained the same. Verizon now contends that this suggestion is "unacceptable" because none of the forthcoming agreements has yet been finalized, yet Cavalier's goal was simply for the parties to benefit from the extensive hearings conducted by the FCC, and from the FCC's findings.

Finally, Verizon wrongly claims that Cavalier did not comply with 47 U.S.C. § 252 "because it has not identified all unresolved issues in its Petition" (Response at p. 5). Verizon points to six new issues and claims that they were listed in its August 13, 2002 e-mail, when that e-mail only stated that "Verizon would expect to make certain limited changes to outdated provisions of [the pre-existing] agreements" between the parties, without proposing any specific changes. This one-off allusion did not identify "unresolved issues," as may be easily discerned by comparing it with specific language proposed by Cavalier on July 31, 2002 in its 19-page annotated draft of new interconnection language for the unresolved issues identified by Cavalier.

For these reasons, Cavalier's Petition is ripe for adjudication and should proceed.

IV. UNRESOLVED ISSUES AND THE POSITIONS OF THE PARTIES

ARBITRATION ISSUES 1-19: Cavalier disagrees with many of Verizon's contentions, but limits this response, pursuant to 47 U.S.C. § 252(b), to the new issues identified by Verizon.

[3] See August 13, 2002 e-mail from Cavalier to Verizon, copy attached as Exhibit "D" to this Response

ARBITRATION ISSUE 20: **Adoption of Verizon's Exhibit A—To the extent that Cavalier has failed to dispute Verizon's positions and proposed contract language, should the Commission order inclusion of that language in the resulting interconnection agreement?**

Cavalier's Alleged Position:[2] "Cavalier alone should be permitted to define the appropriate scope of changes that should be made to the parties' existing interconnection agreement. Cavalier should not have to review Verizon's current contract proposal, analyze whether it is acceptable, or describe how it is objectionable."

Verizon's Position: Verizon's position is set forth on pages 86-90 of its Response and is not restated here.

Cavalier's Actual Position: Verizon should have not have waited until after the arbitration was commenced to adopt new negotiating positions and to adopt new proposed contract language. Verizon's last-minute change of position should not somehow obligate Cavalier to adopt such eleventh-hour terms or conditions, particularly when Verizon admits that some of the proposed contract language is a combination of the pre-existing agreement between the parties and language from Verizon's "model" agreement. (See. e.g., Response at p. 88.) Cavalier should be permitted an adequate opportunity to respond to Verizon's newly proposed language, as outlined in pp. 86-90 **of** Verizon's Response. In Delaware, the Hearing Examiner ordered such a response by October 7,2002, recently extended to October 14,2002, and Cavalier respectfully suggests that a similar schedule be followed in this proceeding, once the State Corporation Commission ("the Commission") determines whether it will exercise its jurisdiction or permit the parties to proceed before the Federal Communications Commission ("the FCC").

ARBITRATION ISSUE 21: **Insurance and Indemnity—Should insurance levels be increased to commercially reasonable levels? Should indemnity provisions be clarified, inter alia, so that they cover the parties and their officers, directors, employees and affiliates?**

Cavalier's Alleged Position: "Unknown."

Verizon's Position: Verizon's position is set forth on pages 91-93 of its Response and is not restated here.

[2] With respect to all new issues raised by Verizon, "Cavalier's Alleged Position" **is** the position that Verizon ascribes **to** Cavalier. Cavalier's position is described under "Cavalier's Actual Position."

Cavalier's Actual Position: Verizon did not identify this specific issue until after Cavalier commenced this arbitration. Nonetheless, Cavalier responds as follows. (a) With respect to insurance, ¶¶ 21.2-21.7 of Verizon's proposed interconnection agreement (Exhibit "A," pp. 17-19, as identified in Response at p. 91[3]) deal with default and termination, not insurance. However, with respect to the "highlights" identified by Verizon (Response at p. 92), the following coverage should suffice: (i) commercial general liability at $1,000,000 per occurrence, (ii) automobile liability at $1,000,000 combined single limit, (iii) worker's compensation insurance within statutory limits, (iv) employers' liability of $100,000, and (v) excess (umbrella) of $10,000,000 aggregate. With respect to the other specific language proposed in ¶¶ 11.1A-11.7A in Exhibit "A" to Verizon's Response (at pp. 11-13), Cavalier believes that it should have an adequate opportunity to review the details and address the matter with Verizon. (b) With respect to indemnity, Cavalier perceives no valid reason to extend the already broad indemnity language contained in ¶¶ 11.l-11.3 of the parties' pre-existing interconnection agreement (Verizon's Response, Exhibit "C" at Part A-9 to Part A-10). Specifically, ¶ 11.2 of that agreement already specifically extends to Verizon's officers, directors, employees, and affiliates. Nonetheless, if the indemnity issue is addressed at all, then all such provisions should be reciprocal in nature and should not unilaterally favor Verizon.

ARBITRATION **ISSUE 22:** Reciprocal **compensation/intercarrier** compensation — Should the interconnection agreement provide for intercarrier compensation consistent with the requirements of preemptive federal law, including the FCC's ***ZSP Remand Order?***

Cavalier's Alleged Position: "In an ultimately futile effort to continue receiving windfall reciprocal compensation payments for as long as possible, Cavalier is trying to set up roadblocks to Verizon's implementation of the ***ZSP*** *Remand Order*. Cavalier also demands that the agreement include terms and condition ***[sic]*** now rejected by the FCC."

Verizon's Position: Verizon's position is set forth on pages 94-100 of its Response and is not restated here.

Cavalier's Actual Position: Verizon did not identify this specific issue until after Cavalier commenced this arbitration. Moreover, Verizon's mischaracterization of Cavalier's position is grotesquely inaccurate. Nonetheless, Cavalier responds as follows. Cavalier

[3] Except at **pp.** 88-90, Verizon's references to specific paragraphs of a proposed interconnection agreement seem to relate to the agreement that Verizon proposed in Delaware and not the one that Verizon proposed in Virginia.

was not among the competitive local exchange carriers who sought to collect "windfall" revenue from ISP-bound traffic. From the outset, Cavalier's business plan and business activities have focused on acquiring facilities-based residential and business customers. Cavalier notes that Verizon cannot muster any allegations, or even one mention of Cavalier (see Response at pp. 94-100) to support its outrageous mischaracterization.[4] Simply put, not only is Cavalier **not** trying to collect revenue for imbalanced ISP-bound traffic, but to the contrary, Cavalier believes that the new interconnection agreement between the parties should bar Verizon from improperly disputing valid bills on this fictitious basis, and that Verizon should stop billing Cavalier for imbalanced, ISP-bound traffic in violation of applicable law. Finally, in an abundance of caution, Cavalier believes that it should be afforded an adequate opportunity to respond to the specifics of the argument and language now advanced by Verizon.

ARBITRATION ISSUE 23: Assurance of payment—Should the interconnection agreement include language requiring adequate assurance of payment from CLECs for amounts due or to become due?

Cavalier's Alleged Position: "Cavalier has never responded to Verizon's proposal regarding assurance of payment, so Verizon does not know if Cavalier disputes its assurance of payment proposal, and if so, on what basis."

Verizon's Position: Verizon's position is set forth on pages 101-102 of its Response and is not restated here.

Cavalier's **Actual Position:** Verizon did not identify this specific issue until after Cavalier commenced this arbitration. Nonetheless, Cavalier responds as follows. Verizon complains that "the current volatile telecommunications environment makes Verizon's need [for adequate assurance of payment] more acute," and apparently believes that the current protections offered under provisions such as § 366 of the Bankruptcy Code, 11 U.S.C. § 366, are inadequate. Cavalier disagrees, believing that § 366 should suffice. Further, even if any "adequate assurance" language were to be added to the interconnection agreement, then such language must reflect the fact that the agreement covers services provided by Cavalier to Verizon, as well as services provided by Verizon to Cavalier.

[4] In addition to relying on non-existent "facts," Verizon refers to equally fictitious subparagraphs of the proposed interconnection agreement that do not exist. Compare Response at p. 94, citing ¶¶ 1.26a, 1.31a, 1.40, 1.44a, 1.61a, 1.61b, 1.71, 1.71b, 1.74, 5.72, 5.7.3, 5.7.4, and 5.8 (ostensibly in connection with intercarrier compensation) **with** Exhibit "A" at ¶¶ 1.1-1.4 (scope of agreement) and ¶ *5* (assignment).

Thus, any new language — such as that proposed by Verizon, in ¶¶ **4.1-4.9** of Exhibit **"A,"** and not in § 20[5], as alleged by Verizon (Response at p. 101) — should be reciprocal, and should require Verizon to provide adequate assurance of payments due to Cavalier. **As** Verizon notes with respect to Worldcom, the identity of an interconnecting carrier and its purported financial stability alone do not guarantee payment. Moreover, if further language were to be added, it should cover at most one month's advance payment, which would be more consistent with the default and termination provisions in ¶¶ 21.1 ***et*** *seq.* of the pre-existing and proposed interconnection agreements, which provides for termination or suspension for breach on 30 days' written notice.

ARBITRATION **ISSUE 24:** Standards **of** Performance — Should the interconnection agreement reference currently applicable standards of performance?

Cavalier's Alleged Position: "Although Cavalier has never responded to Verizon's proposal regarding standards of performance, Cavalier appears content to rely on a reference to standards of performance and associated requirements superseded by the *Virginia Collaborative."*

Verizon's Position: Verizon's position is set forth on pages 103-104 of its Response and is not restated here.

Cavalier's Actual Position: Verizon did not identify this specific issue until after Cavalier commenced this arbitration. Nonetheless, Cavalier responds as follows. Cavalier does not believe that the new interconnection agreement should detract from any performance plan previously or hereafter adopted by the Commission or any other regulatory or adjudicative authority of competent jurisdiction. However, any such plan should not be a ceiling for Verizon's obligations. Instead, Verizon should be subject to any additional performance requirements that are necessary, even if they exceed — but do not contradict — the requirements of any plan adopted by the Commission or any other regulatory or adjudicative authority of competent jurisdiction.

ARBITRATION **ISSUE 25:** Rights **of** Way — Should the interconnection agreement contain detailed terms and conditions governing Cavalier's access to Verizon's poles, ducts, conduits, and rights of way?

[5] Section 20 deals with publicity. See Response, Exhibit "A"

Cavalier's Alleged Position: "All terms and conditions governing Cavalier's access to Verizon's poles, ducts, conduits and rights of way should be contained in the interconnection agreement."

Verizon's Position: Verizon's position is set forth on pages 105-106 of its Response and is not restated here.

Cavalier's Actual Position: Verizon did not identify this specific issue until after Cavalier commenced this arbitration. Nonetheless, Cavalier responds as follows. Although it omits mention of poles, Verizon appears to acknowledge that it must allow Cavalier access to its poles, ducts, conduits, and rights-of-way, pursuant to 47 U.S.C. §§ 224 and 251(b)(4). (&Response at p. 105.) These access duties are subject to negotiation under 47 U.S.C. § 252(a)(1) and arbitration under 47 U.S.C. § 252(b)(1). It is immaterial to Cavalier whether the resulting rates, terms, and conditions are incorporated directly into the interconnection agreement, as was done in the pre-existing agreement (see Attachment VI to Verizon's Response, Exhibit "C"), or incorporating a separate license agreement by reference. However, Cavalier strongly disputes Verizon's contentions to the extent that Verizon seeks to preclude Cavalier from seeking to adopt any rates, terms, and conditions that are not already part of what Verizon describes as its "tariffs or existing licensing agreements" (see Response at p. 108).

WHEREFORE, petitioner, Cavalier Telephone, LLC, respectfully requests:

(a) that the Commission grant all relief requested by Cavalier above, including but not limited to allowing Cavalier adequate opportunity to respond to new, specific interconnection language and arguments advanced by Verizon in its Response; and

(b) that the Commission grant all relief requested by Cavalier in its August **14,** 2002 Petition.

ALTERNATIVELY, if the Commission declines to act on Cavalier's Petition for the reasons stated in the August 6,2002 Order of Dismissal in Case No. PUC-2002-00105, then petitioner, Cavalier Telephone, LLC, respectfully requests that the Commission enter an Order declining to exercise its jurisdiction pursuant to 47 U.S.C. § 252(b) so that the parties **may proceed** with ***this*** arbitration before the Federal Communications Commission.

October 4, 2002

Respectfully submitted,

Cavalier Telephone, LLC

Donald F. Lynch, III (VA Bar No. 40069)
Stephen T. Perkins (VA Bar. No. 38483)
Cavalier Telephone, LLC
2134 West Laburnum **Ave**
Richmond, **VA 23227**
Tel: 804.422.4516
Fax: 804.422.4599
dlynch@cavtel.com

a

CERTIFICATE OF SERVICE

I certify that on this 4th day of October 2002, I have caused **a copy** of the foregoing pleading to be served, by the means stated **below,** on the following:

BY FIRST CLASS US.MAIL

David K. **Hall**
Attorney for Verizon
1515 North Court House Road
Fifth Floor
Arlington, Virginia 22201
Tel.: 703.351.3100,

*BY FAX 772.2143 **AND** BY FIRST CLASS U.S. MAIL*

Lydia R. Pulley
Vice President and General Counsel
Verizon Virginia Inc.
600 East Main **Street,** 11th Floor
Richmond, Virginia 23233
Tel.: 804.772.1547, and

BY FAX 788.8218 AND BY FIRST CLASS U.S. MAIL

Kelly L. Faglioni
Meredith B. **Miles**
Hunton & Williams
Riverfrton Plaza, East Tower
951 *East* Byrd Street
Richmond, Virginia 23219
Tel.: 804.788.8200

Counsel

<u>Exhibit E</u>

Virginia State Corporation Commission Order of Dismissal, Case No. PUC-2002-00171 (October 11,2002).

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 11, 2002

PETITION OF

CAVALIER TELEPHONE, LLC — CASE NO. PUC-2002-00171

For Arbitration Pursuant to
§ 252(b) of the Telecommunications
Act of 1996 to Establish an
Interconnection Agreement with
Verizon Virginia Inc.

ORDER OF DISMISSAL

On August 14, 2002, Cavalier Telephone, LLC ("Cavalier"), filed with the State Corporation Commission ("Commission") a Petition for arbitration of unresolved issues in its interconnection negotiations ("Arbitration Petition") with Verizon Virginia Inc. ("Verizon Virginia") pursuant to § 252(b) of the Telecommunications Act of 1996[1] and § 5-419-10 et seq. of Title 20 of the Virginia Administrative Code. Cavalier requests that the Commission resolve its dispute with Verizon Virginia by: (i) resolving the disputed issues; (ii) affirmatively ordering the parties to submit an interconnection agreement for approval by the Commission in accordance with § 252(e) of the Act; and (iii) retaining jurisdiction until Verizon Virginia has complied with all implementation time frames specified in the

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 et seq. ("Act").

arbitrated interconnection agreement and has fully implemented the terms of this agreement.

On September 9, 2002, Verizon Virginia filed its Response, with exhibits, to the Arbitration Petition of Cavalier. Verizon Virginia responded to the nineteen arbitration issues identified by Cavalier and raised six supplemental issues

On October 4, 2002, Cavalier filed a Response to New Issues Raised by Verizon Virginia, which addressed each of the six supplemental issues raised by Verizon Virginia.

Cavalier brings its Arbitration Petition pursuant to 47 U.S.C. §§ 251 and 252 and the effective rules implementing these provisions of the Act, issued by the Federal Communications Commission ("FCC") *in* its Local Competition Order.[2] Cavalier also relies upon this Commission's Procedural **Rules** for Implementing §§ 251 and 252 of the Act (20 VAC 5-419-10 et seq.). While 20 VAC 5-400-180 F 6 provides for our "arbitration" of contested interconnection matters,[3] Cavalier submits its Arbitration Petition for consideration according to

[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) hereinafter the "Local Competition Order."

[3] As discussed in our Order of June 15, 2000, in Case No. PUC-1999-00101 Petition of Cavalier Telephone, LLC, for arbitration of interconnection rates, terms, and conditions, and related relief, the Commission has authority under state law to order interconnection between carriers operating within the Commonwealth, and § 56-38 of the Code of Virginia authorizes us, upon request of the parties, "to effect, by mediation, the adjustment of claims, and the settlement of controversies, between public service companies, and their employees and patrons."

the Act and not simply under state law. Cavalier recognizes in its Arbitration Petition that the Commission may choose to decline to exercise jurisdiction over this matter and instead refer it to the FCC. Cavalier states that it does not oppose such consideration of the Arbitration Petition by the FCC.

The Commission has declined to waive sovereign immunity under the Eleventh Amendment to the Constitution of the United States. We have avoided waiver of our immunity and explained our reasons in the Commission's Order of Dismissal of the Application of AT&T Communications of Virginia, Inc., et al., For Arbitration with Verizon Virginia, Case No. PUC-2000-00282, issued December 20, 2000 ("AT&T Dismissal Order").[4] We repeat below our holding in the AT&T Dismissal Order in which we declined to exercise jurisdiction.

> As stated in our November 22, 2000, Order, until the issue of the Eleventh Amendment immunity from federal appeal under the Act is resolved by the Courts of the United States, we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity, including the arbitration of rates, terms, and conditions of interconnection agreements between local exchange carriers. (AT&T Dismissal Order, p. 2.)

In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. ___, 70 USLW 4432 (2002) ("Verizon Md. v. PSC of Md."), the

[4] On July 17, 2002, the FCC released the first of two orders (its non-pricing order) on AT&T's Arbitration Petition. See Memorandum Opinion and Order by the Chief, Wireline Competition Bureau, CC Docket No. 00-251.

Supreme Court held that the federal courts have jurisdiction under 28 USC § 1331 to review state commission orders for compliance with the Act or with an FCC ruling issued thereunder[5] and that suit against individual members of the state commission may proceed under the doctrine of **Ex** Parte Young, 209 **U.S.** 123 (1908). However, Verizon Md. v. PSC of Md. did not disclose whether state commissions waive their sovereign immunity by participating in § 252 matters nor whether Congress effectively divested the states **of** their Eleventh Amendment immunity from suit under § 252 of the Act.[6]

[5] While Verizon Md. **v** PSC of Md. was decided on the state commission's enforcement of an interconnection agreement, this decision may suggest federal court jurisdiction under 28 USC § **1331** also applies to a state commission's arbitration of an interconnection agreement as well. The Supreme Court noted in bypassing a determination of whether § 252(e)(6) applied to enforcement actions:

> ...none of the other provisions of the Act evince any intent to preclude federal review of a commission determination. If anything, they reinforce the conclusion that § 252(e)(6)'s silence on the subject leaves the jurisdictional grant of § **1331** untouched. Section 252(e)(4) provides: "No State court shall have jurisdiction to review the action of a state commission in approving or rejecting an agreement under this section." In sum, nothing in the Act displays any intent to withdraw federal jurisdiction under § **1331;** we will not presume that the statute means what it neither says nor fairly implies (footnote omitted).

Verizon Md. v. PSC of Md., 70 USLW **4432** at **4435.**

[6] "Whether the Commission waived its immunity is another question we need not decide, because - as the same parties also argue - even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of Ex Parte Young, 209 U.S. **123** (1908)." Verizon Md. v. PSC of Md., 122 S.Ct. 1753, 70 USLW 4432 at **4435.**

The Commission finds that the Arbitration Petition **of** Cavalier should be dismissed so that the parties may proceed before the FCC. It shall be the responsibility of the parties to serve copies of all pleadings filed herein on the FCC.

Accordingly, IT **IS ORDERED** THAT:

(1) This case is hereby dismissed without prejudice, consistent with the findings above. This Commission will not arbitrate the interconnection issues for the reasons set forth in the findings above.

(2) There being nothing further to come before the Commission, this case is dismissed.